Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term 1978

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No. 78-452

—o—

WOODWARD STATE HOSPITAL-SCHOOL
and STATE OF IOWA,
Petitioners,

vs.

PATRICIA AUXIER,
Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

—o—

RICHARD C. TURNER
Attorney General of Iowa

LEE M. JACKWIG
Assistant Attorney General

State Capitol
Des Moines, Iowa 50319
Telephone: (515) 281-5976

Counsel for Petitioners

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

TABLE OF CONTENTS

	Pages
Opinion Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provision	3
Statement of the Case	3
Reasons for Granting the Writ:	
I. The decision below purports to give an interest in workers' compensation benefits paid voluntarily pursuant to a memorandum of agreement the status of a property right to which due process standards attach.	6
II. The decision below misapplied due process standards set forth by this Court in cases involving direct governmental action to a situation in which no direct governmental action controls the termination of workers' compensation benefits.	11
III. The decision below penalizes employers and insurance carriers who voluntarily assume payment of workers' compensation benefits under a memorandum of agreement by requiring such benefits to continue for at least thirty days after the employers and insurance carriers have reason to terminate benefits—in effect, the decision below requires employers and insurance carriers to forfeit their property without due process of law.	13
Conclusion	16
Certificate of Service	16

TABLE OF CONTENTS—Continued

Pages

Appendix:

A. Opinion of the Supreme Court of Iowa, Filed May 17, 1978 ..... App. 1

B. Order of the Supreme Court of Iowa, Filed June 23, 1978 ..... App. 13

C. Decree of the District Court of the State of Iowa In and For Polk County, Filed October 29, 1976 ..... App. 14

D. Motion and Ruling at Time of Hearing Before the Iowa Industrial Commissioner ..... App. 17

TABLE OF AUTHORITIES

CASES:

Ashby v. Weinberger, 402 F. Supp. 1203 (E. D. N. Y. 1975) 8

Auxier v. Woodward State Hospital-School, 266 N. W. 2d 139 (Iowa 1978) 2, 6, 7, 11, 14, 15

Board of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) 8

Davis v. Caldwell, 53 F. R. D. 373 (N. D. Ga. 1971) 8

Freeman v. Luppes Transport Co., Inc., 227 N. W. 2d 143 (Iowa 1975) 9

Goldberg v. Kelly, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) 12

TABLE OF AUTHORITIES—Continued

Pages

Heim v. McCall, 239 U. S. 175, 36 S. Ct. 78, 60 L. Ed. 206 (1915) 13

McCabe Inspection Service v. Willard, 240 F. 2d 942 (2nd Cir. 1957) 14

Mathews v. Eldridge, 424 U. S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 218 (1976) 11, 12

Parsons College v. North Central Association of Colleges and Secondary Schools, 271 F. Supp. 65 (D. C. Ill. 1967) 11

Sandoval v. Industrial Commission, 144 Ariz. 132, 559 P. 2d 688, cert. denied 432 U. S. 906, 97 S. Ct. 2951, 53 L. Ed. 2d 1078 (1977) 8

Sauter v. Cedar Rapids & I C Ry., 204 Iowa 394, 214 N. W. 707 (1927) 10

Silas v. Smith, 361 F. Supp. 1187 (E. D. Penn. 1973) 10

STATUTES

Section 85.26(2), Code of Iowa, 1977 9

Section 86.13, Code of Iowa, 1971 ..... 7, 9, 10

Section 86.26, Code of Iowa, 1973 4

Section 86.34, Code of Iowa, 1971 ..... 4, 5, 9

Section 86.42, Code of Iowa, 1971 16

TABLE OF AUTHORITIES—Continued

Pages

Section 86.43, Code of Iowa, 1971 16

Title 28, United States Code, Section 1257(3) 2

CONSTITUTIONAL PROVISION

Fourteenth Amendment to the United States Constitution 3

In The

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WOODWARD STATE HOSPITAL-SCHOOL
and STATE OF IOWA,

Petitioners,

vs.

PATRICIA AUXIER,

Respondent.

———o———

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

———o———

Woodward State Hospital-School and the State of Iowa, the Petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Iowa entered May 17, 1978, on which rehearing was denied June 23, 1978.

———o———

OPINION BELOW

This Petition seeks review of the Iowa Supreme Court decision in the case of *Auxier v. Woodward State Hospital-School,* 266 N. W. 2d 139 (Iowa 1978), printed herein as Appendix A. The Order of the Supreme Court of Iowa denying rehearing is unreported and is printed herein as Appendix B.

———o———

JURISDICTION

The judgment of the Supreme Court of Iowa was entered on May 17, 1978. A timely petition for rehearing was denied on June 23, 1978. A jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3).

———o———

QUESTION PRESENTED

What process, if any, is due a claimant prior to termination by an employer or its insurance carrier of weekly workers' compensation benefits which claimant had been receiving pursuant to a voluntary open-ended memorandum of agreement between the claimant and the employer or its insurance carrier?

———o———

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

———o———

STATEMENT OF THE CASE

On May 26, 1971, Respondent Patricia Auxier (hereinafter referred to as claimant) injured her ankle in the course of her employment at Woodward State Hospital-School (hereinafter referred to as hospital).[1]

Pursuant to a memorandum of agreement filed on June 4, 1971 in accordance with Section 86.13, Code of Iowa, 1971, the hospital paid the claimant 113 weeks of temporary total disability benefits.

In August of 1973, the hospital terminated the weekly benefits and advised claimant's attorney by letter as to the reasons for such termination.

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1 The State of Iowa, including its varied divisions such as Woodward State Hospital-School, is a self-insured employer under the Iowa Workers' Compensation Act.

Pursuant to Section 86.34, Code of Iowa, 1971, claimant filed an application for review-reopening against the hospital on September 14, 1973. Claimant maintained that her workers' compensation benefits had been terminated without due process of law. During the review-reopening hearing on January 4, 1974, claimant made a motion requesting that she be paid compensation benefits from the date said benefits were terminated to the date upon which the deputy industrial commissioner would render his decision. The deputy commissioner presiding at the hearing overruled said motion. (See Appendix D.)

On November 20, 1974, the deputy industrial commissioner rendered a review-reopening decision in which he found that the claimant had sustained a fifteen per cent permanent partial disability to the body as a whole, that she was entitled to the statutory maximum in healing period, and that certain medical bills were causally related to the work-injury.

On December 2, 1974, claimant appealed the agency decision to the Polk County District Court pursuant to Section 86.26, Code of Iowa, 1973, again raising the issue of pre-termination due process.

On October 29, 1976, the trial court reversed the agency decision and ruled that as a matter of law claimant was entitled to a hearing prior to any termination of weekly benefits, that as a matter of law claimant was entitled to a "running award" with respect to temporary total benefits, and that undisputed evidence established that claimant was entitled to payment of twenty-one additional medical expenses. (The District Court decree is printed herein as Appendix C.)

On November 23, 1976, the hospital filed notice of appeal to the Supreme Court of Iowa.

On May 17, 1978, the Iowa Supreme Court found that a claimant's interest in workers' compensation benefits is a property right which cannot be taken away without due process of law and ruled that prior to termination of workers' compensation benefits in cases where a claimant has not returned to work, employers or their insurance carriers must provide notice with regard to: the contemplated termination, the time—not less than thirty days after notice—when the termination was to occur, the reasons for the termination, the fact that claimant could submit rebuttal evidence to which the employer or insurance carrier would have to further respond, and the fact that the recipient had the right to petition for review-reopening under Section 86.34, Code of Iowa. The Iowa Supreme Court affirmed the trial court's allowance of the running award, but reversed the trial court on the issue of the additional medical bills.

On May 26, 1978, the hospital petitioned the Iowa Supreme Court for a rehearing on the "notice" determination arguing that a claimant's interest in workers' compensation benefits received pursuant to a memorandum of agreement is not a property right for which due process standards are required.[2]

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2 The hospital also requested rehearing regarding the Iowa Supreme Court's affirmance of the "running award;" however, said determination rests on Iowa law and, accordingly, is not further challenged before this Court.

On June 23, 1978, the Supreme Court of Iowa, without opinion, denied the hospital's petition for rehearing. It is from said decision that the hospital now seeks relief.

———o———

REASONS FOR GRANTING THE WRIT

I. The decision below purports to give an interest in workers' compensation benefits paid voluntarily pursuant to a memorandum of agreement the status of a property right to which due process standards attach.

The Iowa Supreme Court disagreed with the trial court's finding that due process required a hearing prior to the termination of benefits under a memorandum of agreement situation; however, as set forth in the statement of the case, the Iowa Supreme Court found that due process under said arrangement does require some form of notice prior to termination of benefits. *Auxier v. Woodward State Hospital-School*, 266 N. W. 2d 139, 141-142 (Iowa 1978).

Although the Iowa Supreme Court noted that there was no statutory requirement for a hearing nor for notice prior to the termination of benefits paid pursuant to a memorandum of agreement, the determination regarding pre-termination notice was based initially on the assumption that an interest in benefits paid voluntarily pursuant to a memorandum of agreement is a property right which cannot be taken away without due process of law and subsequently on the application of the principle that required

notice or hearing—if not otherwise required by statute—can be derived from common-law principles embodied in the constitutional guaranty of due process of law. *Auxier v. Woodward State Hospital-School*, 266 N. W. 2d 139, 141-142 (Iowa 1978).

The hospital argued in the Appellants' Brief, in the Reply Brief, and in the Petition for Rehearing that an interest in benefits paid voluntarily pursuant to a memorandum of agreement in accordance with Section 86.13, Code of Iowa, 1971, does not constitute a property right to which due process standards apply.[3] It should be noted

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3 Section 86.13, Code of Iowa, 1971 reads as follows:

> "If the employer and the employee reach an agreement in regard to the compensation, a memorandum thereof shall be filed with the industrial commissioner by the employer or the insurance carrier, and unless the commissioner shall, within twenty days, notify the employer or the insurance carrier and employee of his disapproval of the agreement by certified mail sent to their addresses as given on the memorandum filed, the agreement shall stand approved and be enforceable for all purposes, except as otherwise provided in this and chapters 85 and 87.
>
> "In case the injured employee is a minor, either he or his trustee may give a valid and binding release for the compensation paid on his account.
>
> "Such agreement shall be approved by said commissioner only when the terms conform to the provisions of this and chapter 85.
>
> "Any failure on the part of the employer or insurance carrier to file such memorandum of agreement with the industrial commissioner within thirty days after the payment of weekly compensation is begun shall stop the running of section 85.26 as of the date of the first such payment."

The 66th General Assembly of Iowa (1976) struck unnumbered paragraph two; otherwise, present Section 86.13 remains unchanged from the above-quoted version.

that no United States Supreme Court decision has addressed the specific issue presented in this case; further, federal court decisions appear to be in dispute as to whether or not workers' compensation benefits paid under a voluntary agreement create a significant property interest to which strict due process standards apply. *Davis v. Caldwell,* 53 F. R. D. 373 (N. D. Ga. 1971); *Board of Regents v. Roth,* 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Ashby v. Weinberger,* 402 F. Supp. 1203 (E. D. N. Y. 1975); see also *Sandoval v. Industrial Commission,* 144 Ariz. 132, 559 P. 2d 688, cert. denied, 432 U. S. 906, 97 S. Ct. 2951, 53 L. Ed. 2d 1078 (1977)

Here on petition for a writ of certiorari the hospital again maintains that the claimant did not successfully raise a due process argument because the claimant failed to demonstrate a property interest in or a legitimate claim to such benefits.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . He must, instead, have a legitimate claim of entitlement to it . . . they (property interests) are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth,* 408 U. S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972).

Whereas a claimant may logically expect to receive benefits pursuant to a "running award" determination by the industrial commissioner following a hearing to establish the nature and extent of disability, a claimant may not reasonably expect to receive "indefinite benefits" under a memorandum of agreement. According to Iowa case law, a memorandum of agreement establishes only that an employer-employee relationship existed at the time of the injury and that the injury arose out of and in the course of the employment. *Freeman v. Luppes Transport Company, Inc.,* 227 N. W. 2d 143 (Iowa 1975). Where compensation is not commuted, the issue of the extent of disability remains open for adjustment in accordance with the facts upon application for a review-reopening pursuant to Section 86.34, Code of Iowa.[4] The memorandum of agreement establishes neither the existence nor the extent of a disability. The typical open-

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4 Section 86.34, Code of Iowa, 1971 reads as follows:

> "Any award for payments or agreement for settlement made under this chapter where the amount has not been commuted, may be reviewed by the industrial commissioner or a deputy commissioner at the request of the employer or of the employee at any time within three years from the date of the last payment of compensation made under such award or agreement, and if on such review the commissioner finds the condition of the employee warrants such action, he may end, diminish, or increase the compensation so awarded or agreed upon. Any party aggrieved by any decision or order of the industrial commissioner or a deputy commissioner on a review of award or settlement as provided in this section, may appeal to the district court of the county in which the injury occurred and in the same manner as is provided in section 86.26."

Section 86.34 was repealed by the 67th General Assembly of Iowa (1977). Review-reopenings are now provided for in Section 85.26 (2), Code of Iowa, 1977, which reads as follows:

> "2. Any award for payments or agreement for settlement provided by section 86.13 for benefits under the workers' compensation or occupational disease law may, where the amount has not been commuted, be

(Continued on next page)

ended memorandum of agreement cannot be the basis of a judgment pursuant to Sections 86.42 and 86.43, Code of Iowa. *Sauter v. Cedar Rapids & I. C. Ry.*, 204 Iowa 394, 214 N. W. 707 (1927).

The memorandum of agreement involves a contractual claim to benefits, the amount of which the other party to the contract may dispute. *Silas v. Smith*, 361 F. Supp. 1187, 1192 (E. D. Penn. 1973).[5] The concept of due proc-

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reviewed upon commencement of reopening proceedings by the employer or the employee within three years from the date of the last payment of weekly benefits made under such award or agreement. Once an award for payments or agreement for settlement as provided by section 86.13 for benefits under the workers' compensation or occupational disease law has been made where the amount has not been commuted the commissioner may at any time upon proper application make a determination and appropriate order concerning the entitlement of an employee to benefits provided for in section 85.27."

5 In *Silas v. Smith*, 361 F. Supp. 1187 (E. D. Penn. 1973), the Pennsylvania Workmen's Compensation Act provided that the filing of a "Petition to Terminate or Modify a compensation agreement or award" acted as a supersedeas which automatically suspended the compensation payments under the award or agreement to the extent which the alleged facts in the petition would require if proved. The claimant unsuccessfully challenged this procedure as well as the common practice of pre-petition termination and the lack of any provision requiring notice before filing the petition. After the suit was filed, the Act was amended to provide that the filing of such a petition would act automatically as a supersedeas only when the petition alleged either that the claimant had returned to work at prior or increased earnings or that the claimant had fully recovered based on an accompanying medical affidavit or examination report. In all other cases, the effect of the petition would be left to the

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ess does "not control the voluntary arrangements or relations of private citizens in their private dealings with one another." *Parsons College v. North Central Association of Colleges and Secondary Schools*, 271 F. Supp. 65 (D. C. Ill. 1967).

II. The decision below misapplied due process standards set forth by this Court in cases involving direct governmental action to a situation in which no direct governmental action controls the termination of workers' compensation benefits.

The Iowa Supreme Court ruled that due process as it relates to the situation in issue requires "a procedure for notice of termination, similar to the scheme approved by the United States Supreme Court in *Mathews . . .*" *Auxier*, 266 N. W. 2d 139, 142 (Iowa 1978). In *Mathews v. Eldridge*, 424 U. S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), this Court ruled that due process did not require that the recipient of social security disability benefits be

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discretion of the hearing referee, and such decision on the supersedeas request could not be appealed. The Act was also amended to provide for penalties if the filing was not complied with. However, it must be carefully noted that the Act was further amended to provide for the creation of a fund which would be used to reimburse an insurance carrier for benefits paid out because a supersedeas had been denied, and where, upon outcome of the hearing, it was determined that such benefits were not in fact payable.

Under the *Auxier* ruling, an insurance carrier does not have even the right to contest the thirty-day notice period. Had the decision provided a means to challenge said time period, the likelihood of reimbursement to the insurance carrier by the claimant would still be virtually nonexistent insofar as there is no provision made in Iowa law for an insurance carrier to actually recover from the claimant benefits paid which are later determined to have been incorrectly assessed.

accorded an opportunity for an evidentiary hearing prior to termination of said benefits by the state agency division of the social security administration. The *Mathews* decision did discuss the notice afforded the recipient of the governmentally controlled benefits.

The hospital respectfully calls to the attention of this Court the fact that the state agency, the Iowa Industrial Commissioner, does not become involved in the termination of benefits under a memorandum of agreement. (In both the private and public sector, the role of the agency in approving a memorandum of agreement submitted by the parties is minimal—no predetermined amount of benefits is specified for approval.) The employer is the entity that determines whether benefits should be terminated under said contract based upon available medical information or the claimant's return to work. If the other party, the claimant, contests this, a Review-Reopening proceeding may be commenced at which point the agency will become involved. Clearly the due process standards discussed in *Goldberg v. Kelly,* 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) and *Mathews v. Eldridge,* 424 U. S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 218 (1976) took into consideration that an administrative agency controlled and directed the termination of benefits. There is no similar agency involvement in the type of termination of benefits considered in this appeal.[6]

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6 Although the State Comptroller's office now handles the initial administration of state employee claims, the law in effect at the time claimant's injury occurred charged the Industrial Commissioner's office with the certification of these compensation claims drawn upon the State Treasury.

(Continued on next page)

III. The decision below penalizes employers and insurance carriers who voluntarily assume payment of workers' compensation benefits under a memorandum of agreement by requiring such benefits to continue for at least thirty days after the employers and insurance carriers have reason to terminate benefits—in effect, the decision below requires employers and insurance carriers to forfeit their property without due process of law.

The hospital submits that fundamental fairness does not require thirty day notice before termination by a non-agency of non-property interest benefits may occur. Indeed, the thirty day notice requirement may result in fewer memorandums of agreement being entered into in the first instance.

Why would an employer enter into a memorandum of agreement when the likelihood of paying an additional thirty days of compensation that would not necessarily

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However, administrative and judicial functions were vested in separate individuals. The claimant's case was managed by an administrative officer acting as an agent of the state as an employer and not of the state as government. That is the State of Iowa as "govenment" was not involved in the decision to terminate compensation benefits. The State sheds its cloak of official government action when administering its internal affairs and providing benefits and services for its employees. The proprietary functions of the State in matters of employment is analogous to that of private persons. *Heim v. McCall,* 239 U. S. 175, 36 S. Ct. 78, 60 L. Ed. 206 (1915). Furthermore, the Iowa Supreme Court opinion which is the basis of this request for a writ of certiorari does not draw any distinction with regard to due process requirements in the case of a private sector employer and employee from these in the case of a public sector employer and employee.

otherwise be required exists? For example, in a case wherein only temporary total disability is immediately recognizable, the employer who filed a memorandum of agreement would often pay "X" amount of weeks of benefits until receiving medical information that claimant had fully recovered a few weeks earlier and no permanent partial disability was medically evident. It was not unusual for the employer to terminate benefits and for the claimant not to contest such decision unless later experiencing a change in condition proximately caused by the work injury and commencing a review-reopening within three years from the last date benefits were paid. Now, under the requirements of the present decision, the employer will be required to pay an additional thirty days of benefits from the time the employer can reasonably determine that benefits may be terminated—irregardless of whether or not the claimant would have challenged such determination.

Iowa Worker's Compensation rates are substantial and cases are numerous. Even if employers will be able to assume the obvious added expense that will arise pursuant to the *Auxier* notice requirement and will not curtail the practice of entering into memorandums of agreement, the fact remains that thirty days of workers' compensation benefits will be forfeited by such employers in every such case without due process of law. "The Act 'should be administered and interpreted so as to encourage employers to comply with all of its requirements with celerity and not to penalize those who humanely and more than sufficiently meet the demands of the law' (citations)." *McCabe Inspection Service v. Willard,* 240 F. 2d 942 (2nd Cir. 1957) referring to the Longshoreman's and Harbor Worker's Compensation Act.

The defendants maintain that the availability of the review-reopening procedure, discussed above at pages 9, 10, assures the claimant an opportunity to be heard at a meaningful time in a meaningful manner. In the typical case, a claimant will receive some payment of compensation under the voluntarily entered memorandum of agreement without the necessity or delay of having had to file an application before the agency, to take discovery, to present evidence at a hearing, and to await a decision—receiving no weekly benefits in the meantime. Upon termination of such benefits, the claimant may assert a claim for further benefits by filing a review-reopening action. If the claimant is able to prove that such benefits should have been continued, the employer or insurance carrier will be ordered by the agency to pay any back compensation in addition to whatever compensation the nature and extent of claimant's disability at the time of the decision may require. Again, it must be noted that there is no similar provision in either the *Auxier* decision or in the Iowa Workers' Compensation Act for the employer or insurance carrier to recover thirty or more days of compensation paid despite medical evidence that reveals the employee could have returned to work or had reached maximum recovery at a point thirty or more days prior to the time when benefits actually ceased. The excess payment required by the *Auxier* decision deprives employers and insurance carriers of their property without due process of law.

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CONCLUSION

For all the foregoing reasons, the Petitioners respectfully request this Court to grant this Petition For a Writ of Certiorari to the Supreme Court of Iowa.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa

LEE M. JACKWIG
Assistant Attorney General
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Lee M. Jackwig, Assistant Attorney General for the State of Iowa, hereby certify that on the 13th day of September, 1978, I mailed three (3) copies of Brief for Petitioner, correct 1st class postage pre-paid to:

Harry W. Dahl
5600 Grand Avenue
Des Moines, Iowa 50312
Counsel for Respondent

Fred D. Huebner
510 Central National Bank Building
Des Moines, Iowa 50309
Counsel for Amicus Curiae (In the Supreme Court of Iowa)

I further certify that all parties required to be served have been served.

/s/ Lee M. Jackwig
Assistant Attorney General
State Capitol
Des Moines, Iowa 50319

APPENDIX A

IN THE SUPREME COURT OF IOWA

PATRICIA AUXIER,
Appellee,

vs.

WOODWARD STATE HOSPITAL-SCHOOL,
Employer,

and

STATE OF IOWA,
Appellants.

(Filed May 17, 1978)
56/60108

Appeal from Polk District Court—Leo Oxberger, Judge.

Appeal from review-reopening decision in worker's compensation case.—Affirmed in part, reversed in part.

Richard C. Turner, Attorney General, and Lee M. Jackwig, Assistant Attorney General, for appellants.

Harry W. Dahl, of Des Moines, for appellee.

Fred D. Huebner, of Des Moines, amicus curiae.

En banc.

HARRIS, J.

A review-reopening decision by the deputy industrial commissioner was reversed on appeal to the trial court. Woodward State Hospital (the hospital) and the State of Iowa, as claimant's employer, have appealed the trial court's determination to us. We affirm in part and reverse in part.

Patricia Auxier (claimant) was employed by the hospital at Woodward. In February 1971 claimant, while at home, broke her leg in an accident which was unrelated to her employment. As soon as the cast was taken off she returned to work where, on May 26, 1971, she was tripped by one of the patients in the hospital. In her fall she reinjured her right ankle.

On June 4, 1971 the hospital filed a report of the injury. A memorandum of agreement was made and approved by the commission on June 7, 1971. Pursuant to that agreement claimant was paid $47.81 for 113 weeks.

Payments were abruptly stopped August 2, 1973. The only notice claimant received of termination of the payments was a letter to her attorney enclosing a warrant for two weeks compensation from July 19, 1973 to August 1, 1973:

"* * * With this State warrant we are discontinuing further payments to your client, for the reason that the Iowa City report does not indicate that your client has very much permanent partial disability. Also, medical reports indicate that your client has other conditions not related to her work injury. With this warrant we will have paid your client a total of 113 weeks of workmen's compensation."

Not surprisingly the parties are in disagreement as to claimant's exact physical condition at the time, and are in sharp disagreement as to what infirmities derived from claimant's work-related injury.

On September 14, 1973 claimant filed her application for review-reopening under § 86.34, The Code. She

claimed her worker's compensation benefits had been terminated without her consent, while she was still disabled, and in contravention of her rights to due process of law. The deputy commissioner filed his decision on the review-reopening on November 20, 1974. He found: (1) claimant is five feet nine inches tall and weighs 220 pounds; (2) claimant suffered her injury after being tripped by a patient at Woodward; (3) under the memorandum of agreement claimant was paid 113 weeks of compensation at $47.81 per week; (4) upon the basis of various medical reports the commissioner concluded claimant suffered many other ailments to her leg, back, nerve and blood systems, which were not work related; (5) claimant's permanent partial disability was 15 percent of the total body; (6) compensation should have been paid to claimant for 75 weeks at $56 per week (permanent partial disability) and 45 weeks at $57.39 per week (healing period). He also allowed for payment of interest and a portion of the medical expenses claimed.

Claimant appealed the industrial commissioner's decision to the trial court which ruled the commissioner erred as a matter of law in terminating the payments without a hearing. The trial court accordingly ordered payment of compensation to claimant for the period from termination, August 1, 1973, to November 20, 1974, the date of the review-reopening decision. The trial court also ordered a "running award" paid for 300 weeks or until it was established claimant's disability is either permanent or total, whichever period is less. The trial court separately allowed 21 other medical bills.

I. The first issue is the hospital's challenge to the trial court's holding the claimant was entitled to a pretermination hearing before disability benefits could be stopped. Because there was no such hearing the trial court ordered benefits paid until the date of the commissioner's decision. There is no statutory requirement for such a hearing so the dispute is whether one is demanded by the due process requirements of Amendment 14 to the United States Constitution and Art. I, § 9, of the Iowa Constitution.

Claimant, in support of her due process claim, relies heavily on Goldberg v. Kelley, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). In *Goldberg* the majority held procedural due process required that, before terminating welfare benefits, the recipient must be accorded an evidentiary hearing. The court set up the following six requirements: (1) "timely and adequate notice detailing the reasons for a proposed termination"; (2) "an effective opportunity [for the recipient] to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) retained counsel, if desired; (4) an impartial decision-maker; (5) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and the evidence relied on. 397 U. S. at 266-271, 90 S. Ct. at 1019-1022, 25 L. Ed. 2d at 298-301.

The hospital, in resisting the claim, points to Mathews v. Eldridge, 424 U. S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In *Mathews* the question was whether due process requires that, prior to termination of social security disability benefits, the recipient be accorded an opportunity for an evidentiary hearing. In answering the question the court used a balancing test which weighed three factors: (1) the private interest affected; (2) the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest including the function involved, and the fiscal and administrative burdens and any additional burdens a new procedure would entail. 424 U. S. at 335, 96 S. Ct. at 903, 47 L. Ed. 2d at 33. All three factors were variable. In balancing them the majority in *Mathews* found no violation of due process for want of a pretermination hearing under the facts presented.

Under the social security act, 42 U. S. C. § 423 Eldridge, the claimant in *Mathews,* received a questionnaire from a state agency charged with monitoring his condition. He answered the questionnaire claiming his condition had not improved and referred to medical sources and his treating physicians. The state agency then obtained reports from the physicians and considered them. Thereafter it informed Eldridge by letter it had made a tentative determination his disability had ceased in May of 1972. The letter contained a statement of reasons for the proposed termination of benefits and advised Eldridge he might request reasonable time in which to obtain and submit additional information pertaining to his condition. Although he challenged the description of his condition, Eldridge chose not to submit further evidence.

The agency made a final decision that Eldridge had ceased to be disabled in May of 1972. This determination was accepted by the social security administration

which notified Eldridge in July his benefits would terminate after that month. It also advised him he had a right to seek reconsideration by the state agency of the initial determination within six months. Eldridge made no such request but brought suit on the claim he had a constitutional right for a pretermination hearing as specified in *Goldberg*. His claim was denied by the majority. See also Sandoval v. Industrial Commission, 144 Ariz. 132, 559 P. 2d 688, cert. denied 432 U. S. 906, 97 S. Ct. 2951, 53 L. Ed. 2d 1078 (1977).

The test of whether due process of law has been violated is whether the challenged practice or rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U. S. 97, 105, 54 S. Ct. 330, 105, 78 L. Ed. 2d 674, 677 (1934), overruled on other grounds Malloy v. Hogan, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); 90 A. L. R. 575. See 1 Antieau, Modern Constitutional Law, § 5:110.

It is apparent to us, and is not seriously disputed herein, that claimant's interest in worker's compensation benefits is a property right which cannot be taken away without due process of law. Analogous claims were deemed property rights so protected in Ross v. City of Des Moines, 249 N. W. 2d 648, 650 (Iowa 1977); Koelling v. Trustees of Skiff Hospital, 259 Iowa 1185, 1197, 146 N. W. 2d 284, 296 (1966).

It is well settled the extent and nature of the hearing required for due process varies according to the needs and circumstances of a given case. But it is clear that some pretermination notice is required, under *Goldberg*

and the cases it cites, as a component of due process. And it is now well settled that some opportunity must be accorded to protest and present proof as to why a property right should not be terminated. Memphis Light, Gas and Water v. Craft, — U. S. —, — S. Ct. —, — L. Ed. 2d — (1978) (46 Law Week 4398).

We believe the due process clauses of both the federal and state constitutions require a procedure for notice of termination, similar to the scheme approved by the United States Supreme Court in *Mathews*, supra. It is to be conceded Code chapter 86 specifies no such requirements. But where a required notice (or hearing) right is not given by statute it "* * * is derived in a proper case from common-law principles embodied in the constitutional guaranty of due process of law. * * *." 2 Am. Jur. 2d, Administrative Law, § 398 at p. 203.

We hold, on the basis of fundamental fairness, due process demands that, prior to termination of worker's compensation benefits, except where the claimant has demonstrated recovery by returning to work, he or she is entitled to a notice which, as a minimum, requires the following:

[1] the contemplated termination,

[2] that the termination of benefits was to occur at a specified time not less than 30 days after notice,

[3] the reason or reasons for the termination,

[4] that the recipient had the opportunity to submit any evidence or documents disputing or contradicting the reasons given for termination, and, if such evi-

dence or documents are submitted, to be advised whether termination is still contemplated,

[5] that the recipient had the right to petition for review-reopening under § 86.34.

Under the summary procedure employed in the instant case there was no such notice. Accordingly the trial court reached the right result in ruling the commissioner erred as a matter of law in terminating claimant's benefits.

II. The second issue in this appeal has to do with § 85.33, The Code, which provides: "The employer shall pay to the employee for injury producing temporary disability and beginning upon the eighth day thereof, weekly compensation benefit payments for the period of his disability, including the periodical increase in cases to which § 85.32 [when compensation begins] applies." Temporary disability benefits paid under § 85.33 have come to be called "running awards." The deputy commissioner found claimant was permanently disabled and thus not entitled to a running award. The trial court on appeal found claimant was not permanently disabled but only temporarily disabled and therefore entitled to a running award, either for 300 weeks or until such time as the hospital at a hearing established one of two things: (1) claimant's temporary disability had terminated, or (2) claimant had become permanently disabled.

Under these somewhat unique circumstances we must review the claims by an injured claimant that her injury is not permanent and by her employer that it is. The trial court's review of the decision of the industrial commissioner of course was not *de novo*. In Holmes v. Bruce Motor Freight, Inc., 215 N. W. 2d 296, 301 (Iowa 1974) we explained existing rules on the scope of our review:

"* * * Whether a particular decision of the commissioner be for the claimant or for the employer, the judicial scope of review is to ascertain whether there is 'sufficient competent evidence in the record to warrant the making of the order or decision.' * * * [W]e regard the commissioner's fact-findings as tantamount to jury findings; if a jury issue is presented, were the case tried to a jury, the commissioner's findings stand. Langford v. Kellar Excavating & Grading, Inc., 191 N. W. 2d 667, 668 (Iowa) ('We have variously expressed this rule by saying his findings are binding upon us if supported by substantial evidence; the facts determined by the industrial commissioner have the same effect as a jury verdict; and we may not interfere with such findings where there is a conflict in the evidence or when reasonable minds may disagree as to the inferences to be drawn from the evidence, whether disputed or not.'); (Authority)."

More recently we discussed the scope of our *de novo* review under the new administrative code. It is governed by § 17A.19, The Code. The question is whether the agency action is "* * * unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole; * * *." § 17A.19(f). City of Davenport v. Public Employment Relations Board, — N. W. 2d — (Iowa 1978), and authorities.

The question then is whether there was any substantial evidence to support the commissioner's finding claimant's injury was permanent. The commissioner's findings

are to be viewed in the light of the evidence as a whole. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N. W. 2d 251, 256-257 (1963). We explained the responsibilities of the commissioner in making his findings in Catalfo v. Firestone Tire and Rubber Co., 213 N. W. 2d 506, 509-510 (Iowa 1973).

It appears from the statement of the trial court ["* * * and my job will be to search the record to see where the doctor testified that it was his opinion that this was a permanent injury."] that the trial court believed the evidence the disability was permanent should be based on medical testimony.

The trial court searched in vain for any medical evidence of permanency. The closest any medical testimony got to the subject of permanency was the statement of claimant's physician, "it's now hoped that she'll [claimant] finally begin to settle down and that she will be relieved ultimately of some of her low back and right leg discomfort." Both parties take that statement to support their conflicting views on the subject of permanency.

The only possible support we can find for the commissioner's holding that the claimant's disability was permanent and not temporary was in the total pattern of her physical condition.

Although the question is an extremely close one we believe on balance the record cannot be said to support the commissioner's finding as to the permanency of claimant's disability. The trial court was right in so finding. We find no merit in the hospital's challenge to the trial court's allowance of the running award.

III. The third issue in this appeal is controlled by our scope of review. Code section 85.27 provides that the employer shall pay reasonable health care services upon gaining notice or knowledge of an employee's injury. The section goes on to provide in material part: "Charges believed to be excessive or unnecessary may be referred to the industrial commissioner for determination, * * *."

Twenty-five medical bills were presented by the claimant. The commissioner ordered four of them paid. These four are not involved in this appeal. Twenty-one bills were disallowed by the commissioner because he determined the claimant had failed to present sufficient evidence to prove a causal connection between the conditions which were the subject of the treatment and the claimant's work-related injury.

The parties stipulated the amounts of the medical bills were fair and reasonable. Accordingly Code section 85.27 required the hospital to furnish claimant with whatever was necessary and needed in treatment of her work-related injury. Sister Mary Benedict v. St. Mary's Corporation, 255 Iowa 847, 854-856, 124 N. W. 2d 548, 553 (1963); Polson v. Meredith Publishing Company, 213 N. W. 2d 520 (Iowa 1973).

Claimant was entitled to recover the expenses in treating whatever aggravation of her pre-existing condition was caused by her work-related injury. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 374-375, 112 N. W. 2d 299, 302 (1961). On the question of what sort of evidence might tend to connect up a disability and a work-related injury we held in Anderson v. Oscar Mayer & Co., 217 N. W. 2d 531, 536 (Iowa 1974) the commis-

sioner could, but would not be required, to make an award upon expert testimony that the present condition "might be" so causally connected.

We find the commissioner could find from this record that the claimant failed to prove a causal connection between the work-related injury and the condition treated in the 21 disallowed medical bills. Our review on that question, like that of the trial court, is not *de novo*. In division II of this opinion we pointed out that the commissioner's findings are binding upon us if supported by substantial evidence. We believe, on this assignment, they were. It was error for the trial court to determine claimant had established a causal connection as a matter of law.

In summary we affirm the trial court for ruling the commissioner erred as a matter of law in terminating claimant's benefits. We affirm the trial court's allowance of the running award. We reverse the trial court on the question of the 21 medical bills and reinstate the commissioner's disallowance of them. Tax costs two thirds to the hospital and one third to claimant.

AFFIRMED IN PART, REVERSED IN PART, BUT NOT REMANDED.

All Justices concur.

APPENDIX B

IN THE SUPREME COURT OF IOWA

No. 2-60108

PATRICIA AUXIER,

Appellee,

vs.

WOODWARD STATE HOSPITAL-SCHOOL,

Employer,

and

STATE OF IOWA,

Appellants.

ORDER

(Filed June 23, 1978)

Appellants' petition for rehearing, filed in the above entitled matter, has been duly considered by the entire membership of the court and is now overruled and denied.

Done this 23rd day of June, 1978.

/s/ C. Edwin Moore, Chief Justice
Iowa Supreme Court

Copies to:

Lee M. Jackwig
Assistant Attorney General

Fred D. Huebner
510 Central National Bank Bldg.
Des Moines, Ia. 50309

Harry W. Dahl
5600 Grand Ave.
Des Moines, Ia. 50312

APPENDIX C

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

EQUITY NO. CE 3-1534

PATRICIA AUXIER,

Plaintiff,

vs.

WOODWARD STATE HOSPITAL and
STATE OF IOWA,

Defendants.

DECREE

NOW ON THIS 29th day of October, 1976, the above-captioned matter having been heard by the Court, briefs and arguments submitted by counsel, the Court finds that the weight of the evidence before the Deputy Industrial Commissioner upon review-reopening established as a matter of law that the Claimant is entitled to a hearing prior to a termination of weekly benefits and is entitled to weekly compensation paid from the time the Industrial Commissioner stopped it on August 1, 1973 to the date of the review-reopening decision on November 20, 1974; and that although there is no evidence of any permanent disability as of this date in this record, based upon the undisputed evidence in the record that the Claimant has temporary total disability, as a matter of law she is entitled to a "running award" for a maximum of 300 weeks or until such time at another hearing it is established that her temporary disability has terminated or that she has permanent disability; and that the undisputed evidence shows that various medical, hospital, and other expenses were for treatment of plaintiff's injury and she is then entitled to payment of the following:

Dr. Ronald Bunten	$780.00
Iowa Methodist Hospital (1-7-74 to 1-15-74)	477.90
Iowa Methodist Hospital (1-20-74 to 1-31-74)	937.45
Iowa Methodist Hospital (2-25-74 to 3-11-74)	1013.10
Associated Anesthesiologists (1-21-74)	$122.50
Dr. Dajani (7-26-73)	50.00
Osco Drug	6.52
Dr. McClain (7-18-72)	25.00
Iowa Methodist Hospital (11-20-71 and 2-21-72)	681.00 (—670.50 paid)
Boone Hospital (5-5 to 19-72)	1238.02 (—549.70 paid)
Boone Hospital (5-29 to 6-6-72)	480.50 (—415.00 paid)
Mayo Clinic (5-19 to 24-72)	563.10 (—173.60 paid)
St. Mary Hospital (5-19 to 24-72)	295.00 (—100.00 paid)
Des Moines General Hospital (7-18 to 29-72)	1525.40
Dr. McNerney (7-27 to 30-72)	80.00
College Clinic (7-17 to 30-72)	200.00
Dr. Loerke (8-1-72)	56.00
Iowa Methodist Hospital (7-28-73)	710.05
Dr. Gustafson (7-17 to 11-19-73)	223.07
Iowa Sickroom Supply (8-7 to 10-7-73)	25.13
Dallas County Hospital	44.15
Dallas County Hospital	9.50
Dallas County Ambulance (7-17-73)	42.00
Pathology Lab (8-2-73)	17.00
Dr. Preston	20.00

IT IS THEREFORE HEREBY ORDERED AND DECREED that the Review-Reopening Decision of the Deputy Industrial Commissioner herein be and is hereby

modified. The defendants are hereby ordered to pay compensation to Claimant from August 1, 1973 to the date of the Review-Reopening Decision on November 20, 1974, to pay the above-listed medical and hospital bills, and to pay weekly compensation to Claimant for a maximum of 300 weeks or until such time as the State of Iowa at a hearing establishes that her temporary disability has terminated or that she has permanent disability.

/s/ Leo Oxberger
Judge, Fifth Judicial District
State of Iowa

APPENDIX D

Motion and Ruling at time of Hearing before the Iowa Industrial Commissioner (Transcript page 7, line 16 to page 10, line 13).

Mr. Dahl: I think the only other thing that the claimant has at this time is to make a motion. It is the claimant's position that the State of Iowa deprived her of workmen's compensation benefits without due process of law by stopping them as of August 1, 1973, without an opportunity for a hearing and without the agreement of the claimant, in line with the decision in Davis v. Caldwell. It's also the claimant's position that as an employee of the Government of the State of Iowa, she was denied equal protection of the law as accorded to other employees in private employment covered by the Iowa Workmen's Compensation Law. And she would ask at this time that the Deputy Commissioner direct that payments be brought up to date and continued until such time as it is determined that the claimant is no longer entitled to benefits on a showing by the State, rather than a showing by the claimant that she is still disabled.

Mr. McGrane: The State will resist that on both grounds, and it is not a denial of due process. There has been no determination yet that a hearing is necessary in order to stop payments. Also, as far as equal protection, I am not sure of his grounds, but I believe he is referring to the judicial capacity and the investigative capacity of both within the same agency, and I think that they are sufficiently separated within that agency, that there is no conflict and there is a full, clear, just determination made by the agency involved, and there is no

denial of equal protection. So I think there should not be a resumption of payments until such determination is made. If there were a hearing—If at this time payments were made and at a later time it was determined payments were not justified, then it would impose quite a burden, I would think, for a person, if not of considerable means, even to try and come up with the money to refund it, which would be necessary if there was a determination it wasn't allowable. The State will therefore resist.

Mr. Dahl: I am trying to help out the Commissioner himself by perhaps obtaining a ruling that will permit him to separate these functions as he had recommended in the 30th biennial report to the Governor. This was filed last year, and at that time he said, "Although this office agrees with all of the recommendations (of the Governor's Committee), we urge that the next priority be given to one which does not require legislative action. This is the assigning of the responsibility for determining the validity of State employees' claims to the General Services Department and adding a claims adjuster to the department for this purpose. Although no personnel division as such exists in the General Services Department, the responsibility should definitely be removed from the Industrial Commissioner. At present, a State employee who is injured on the job must look to this department for the initial determination of the compensability of his claim. If his claim is denied, he must then petition this same department for a hearing on his claim. Although care is exercised in avoiding a conflict of interest in acting as both employer and arbitrator, it does not seem just that an employee must go to the same

agency that turned him down in the first instance to maintain his action to show that they were in error."

Commissioner, I think that by ordering the payments be continued pending the outcome of this case, that it will remove any possible intimation that things are not completely fair.

Mr. McGrane: In further resistance, I think that might in fact be outside of the power of the hearing examiner in this case when a person who is responsible for determining whether to continue those payments has denied them, and that sole responsibility of this hearing examiner is to determine the grounds for payment or nonpayment. And to order back pay, or whatever, without a hearing, I think is beyond the power of this Commissioner.

The Deputy Industrial Commissioner: Mr. Dahl, your motion will be overruled, and the relief that you are requesting is denied.